



COMPTROLLER GENERAL OF THE UNITED STATES  
WASHINGTON, D.C. 20548

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October 18, 1972

Electrospace Corporation  
956 Brush Hollow Road  
Westbury, Long Island, New York 11590

Attention: Mr. Halsey F. Hubbard  
Vice President, Contracts

Gentlemen:

Reference is made to your protest that the technical data package furnished bidders under invitation for bids DAAB05-72-B-0012, issued by the United States Army Electronics Command, Philadelphia, Pennsylvania, is so deficient as to render the invitation legally defective.

In addition to your protest under invitation -0012, an investigation is being performed by our Office pursuant to a congressional request concerning your contention that a retrofit program with respect to AN/PRC-77 radio sets previously furnished by Electrospace and occasioned by defective design, would be more economically performed by Electrospace than by the Army itself. That aspect will be covered in a separate report to the congressional source that made the request.

Invitation -0012 contemplates a firm fixed-price multiyear contract for stated quantities of AN/PRC-77( ) radio sets and RT-841( )/PRC-77 receiver-transmitters. Your protest is limited to the AN/PRC-77( ) radio sets. Although bid opening was originally set for April 24, 1972, it has been postponed on several occasions pending resolution of your protest and is currently set for October 18, 1972.

It is your position that the technical data package contains serious major design deficiencies not readily apparent to bidders without prior production experience the effect of which will be that contract end items manufactured to the requirements of the technical data package will not meet the contract requirements for end item performance without costly modification. You contend that fair competition in this situation is impossible because uninformed bidders will not price necessary engineering design and modification work required to correct defects, although the cost of such work will ultimately be borne by the Government through the medium of after-award change orders. On the other hand experienced bidders, such as Electrospace, will be priced out of the competition because it will be necessary for them to take these unannounced design defects into consideration in the formulation of a bid price.

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As an indication that the design of this radio set is not perfected, you point out that "Four contractors have been involved in this program and all four have experienced serious technical difficulties which have resulted in production delays and cost increases to the Government." Also, as an indication of the complexity of the problems to be anticipated under the instant invitation by an uninitiated bidder, you state that "the data package is replete with design deficiencies and misleading requirements which cannot be apparent to even the most knowledgeable engineer except after he has considerable intimate experience with the hardware."

You further contend that specification changes made by invitation amendment since your protest was filed, while correcting some of the problems of which you have complained, have not served to cure the major deficiencies contained in the data package. Finally, it is alleged that MEMCOR Division of E-Systems Inc., a contractor currently producing AN/PRC-77 radio sets, which production is relied on in the report of the Army Materiel Command (AMC) in this matter as proof that the questioned data package is in fact adequate, has, to the contrary, been experiencing serious production difficulties including rejection of certain production lots.

The position of AMC is simply that in the opinion of its engineering personnel, the technical data package--particularly as amended following your protest--is sound from a design standpoint and therefore suitable for competitive procurement. Concerning the allegation that the current contractor is experiencing serious difficulty, AMC has advised that while the contractor has been on "tightened inspection," as required by its contract because of difficulties in the "quality area," these difficulties have no bearing on the design of the radio sets as represented by the technical data package, and that they are being cleared up in due course by "re-work" of rejected lots. Inasmuch as no evidence has been presented to refute the Army's position on the latter point, we must accept it as valid.

During the development of this case, you have stated your position in great detail in several letters to our Office with respect to the various specification areas which you consider to be deficient. These letters have in turn been forwarded to AMC for comment. Also, we understand that your position in this regard has been discussed both with engineering personnel at the Electronics Command in Philadelphia and with Army officials in Washington. It seems clear, therefore, that your position in this matter has been given thorough consideration by the Army. However, as you know, the Army has continued to maintain that the technical data package is adequate and to recommend, therefore, that your protest be denied.

For reasons set out below, we must conclude that no basis exists for challenging the Army's determination that the instant technical data package is adequate for competitive procurement. Since we do not base this conclusion on an engineering determination as to the correctness, or lack thereof, of the respective opposing viewpoints, but rather on the basis of a legal determination, the specific areas of alleged technical data package inadequacy need not be discussed.

It has been a long-held and frequently stated rule of our Office that the drafting of specifications is primarily a function of the administrative agency as that agency is uniquely knowledgeable as to what will serve the Government's minimum needs in a given instance and that where a difference of expert technical opinion exists as to specification adequacy, our Office will not substitute its judgment for that of the contracting officials in the absence of clear and convincing evidence that those officials are in error. See 40 Comp. Gen. 294 (1960). That there is no clear and convincing evidence of error in this case is exemplified, we think, by your statement, quoted earlier, to the effect that only prior contract experience would enable even the most knowledgeable engineer to perceive the defects inherent in the data package. If an engineer experienced in the technology involved in this case cannot perceive error in the data package, we do not think it can be said that evidence of error is clear and convincing.

With respect to your contention that fair competition is precluded in this procurement because bidders lacking prior production experience will seriously underprice their bids to your competitive detriment, we note that a special notice on page 31 of the invitation calls attention to provision F9g of the invitation supplemental technical instructions, entitled "Production Evaluation Concept," and points out among other things that the provision requires the contractor to bear the cost of implementing certain changes in technical data. The special notice then advises that the contractor in this instance will be required to expend production engineering effort in order to successfully manufacture the contract end items. Among the "other things" provided by the "Production Evaluation Concept" provision, however, is the agreement by the contractor to bear the cost of technical data changes determined to be essential to accomplishment of the following six tasks:

"(a) Attainment of functional or performance requirements of specifications.

"(b) Compatibility between specified quality assurance provisions and the mandatory physical or functional requirements of specifications and drawings.

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"(c) Compatibility between drawing parts lists and other technical data.

"(d) Correction of an impossible manufacturing condition.

"(e) Correction of an impossible assembly condition.

"(f) Procurement of purchased parts and materials."

The above enumerated contractor-assumed responsibilities represent, we think, an admission that no data package or specification can be expected to be totally without defects. Furthermore, all bidders to this invitation can be considered to be sophisticated in the ways of Government procurement and in solving problems encountered in the construction of complicated radio sets so that the special notice provision, coupled with the "Production Evaluation Concept" provision, serves as adequate notice to them to scrutinize carefully the technical requirements and to price accordingly any significant unknowns for which they will bear the burden of correcting. The contract terms place the responsibility of anticipating such defects on the contractor, not the Government. While these contract terms might not withstand attack if specification defects encountered are substantially greater than could have been contemplated at the time of bidding, we think they are sufficient to reasonably allocate performance risk and to assure competition, particularly in view of the administrative position that no significant design defects exist. See, in this regard, B-165953, October 27, 1969.

In accordance with the above considerations, your protest must be denied.

Very truly yours,

R.F.KELLER

| Deputy Comptroller General  
of the United States